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No. 87-603

IN THE

Supreme Court of the United States

October Term, 1987

THERESA MIERA, J. D. SANCHEZ, EDWARD LEYBA, JUDI MESTAS and FELIX DURAN,
Petitioners,

v.

TERESA GARCIA, a minor, by her next friends Max and Sandra Garcia,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

DANIEL H. FRIEDMAN
Simons, Cuddy & Friedman
Post Office Box 5738
Santa Fe, NM 87502-5738
(505) 988-4476

Counsel for Petitioners

January 19, 1988

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

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The petitioners Theresa Miera, J. D. Sanchez, Edward Leyba, Judi Mestas and Felix Duran respectfully submit the following reply brief in support of their petition for a writ of certiorari.

Respondent offers no plausible grounds for opposition to the petition. Respondent's primary arguments are, first, that

there is actually no conflict between the Courts of Appeals for the Fourth and Fifth Circuits concerning the existence of a substantive due process cause of action and, second, that this Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), has already recognized the cause of action, Response, p. 3. The obvious flaws in these assertions are that the Court of Appeals for the Tenth Circuit itself acknowledged a "direct conflict" between the other circuits, Petition, p. A-14, and this Court in *Ingraham* explicitly disclaimed any determination on the substantive due process cause of action, *id.*, at 679, n.47.

Contrary to Respondent's assertion, the conflict between the two circuits, now further complicated by the Court of Appeals for the Tenth Circuit's divergent interpretation of the elements of the claim, Petition, pp. 20-21, both justifies the grant of a writ of certiorari and the petitioners' entitlement to qualified immunity on the basis of unsettled law.

Respondent spends considerable time attempting to demonstrate, incorrectly, that New Mexico provides no post-deprivation remedies for excessive corporal punishment,[1] while simultaneously arguing that their availability or non-availability is irrelevant to whether excessive corporal punishment implicates a substantive due process cause of action, Response, pp. 3-4.

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1. The district court's determination that New Mexico provides after-the-fact tort and criminal remedies, Petition, p. B-9, was not challenged on appeal, Petition, p. A-10. Furthermore, legislation enacted subsequent to the commencement of this case clarified that only school officials who administer punishment in good faith are immune from damages, a formulation which is in complete harmony with a substantive due process standard, *see*, § 22-5-4.3D, N.M.S.A. 1978 (1986 Repl.).

To the contrary, *Ingraham*'s observation that "common-law constraints will . . . effectively remedy and deter" the anticipated "low incidence of abuse", *id.*, 670, 678, n.46, suggests a rationale for precluding excessive punishment as a substantive element of the liberty interest. Far from militating against the grant of a writ of certiorari, a definitive determination of this critical question and related questions of equal magnitude is sorely needed by school officials, students and parents throughout the country.

Finally, Respondent argues that the principles of *Anderson v. Creighton*, 483 U.S.___, 97 L.Ed.2d 523 (1987) are not controlling because, in ways not specified by Respondent, the Court of Appeals for the Tenth Circuit "did address, with fact-specific reference and anology [sic], *the clearly established legal principle* . . .", Response, p. 5 (emphasis added). The italicized language echoes the Court of Appeals for the Tenth Circuit's conclusion that officials who fail to apply "general, well developed legal principles", Petition, p. A-12, must be denied qualified immunity. However, analysis of legal principles at this level of abstraction is precisely the practice rejected in *Anderson v. Creighton*, 97 L.Ed.2d, at 530-531.

Denial of qualified immunity in the face of a "direct conflict" between two appellate circuits, Petition, p. A-14, coupled with an expectation that school officials divine the contrary "implicit" intent behind an "explicit disclaimer" in *Ingraham*, *supra*, Petition, pp. A-4, A-13, broadly departs from the teachings of this Court and conflicts with the holdings of other courts of appeals. This Court has not hesitated to summarily remand qualified immunity decisions for reconsideration in light of *Anderson v. Creighton*, *see*, *Pickett v. Chapman*, 801 F.2d 912 (7th Cir. 1987), *cert. granted and vacated*,

56 U.S.L.W. 3241 (U.S. Oct. 5, 1987) (No. 87-28), *see,* Petition, p. 12, n.3. Certiorari should be granted in the present case.[2]

Respectfully submitted,

DANIEL H. FRIEDMAN
Simons, Cuddy & Friedman
Post Office Box 5738
Santa Fe, NM 87502-5738
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Counsel for Petitioners

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2. Respondent suggests that petitioners have "improper[ly]" portrayed the facts at Petition, p. 6, n.2, *see,* Response, p. 1. Petitioners stand by their assertion that, even under the Respondent's version of the facts, the medical treatment required for her alleged injuries was minimal.